

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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VoiceStream Wireless Corporation, )  
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Transferor, and )  
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Deutsche Telekom AG, Transferee, )  
 )  
Application for Consent to Transfer )  
of Control and )  
Petition for Declaratory Ruling )  
 )

IB Docket No. 00-187

**COMMENTS OF  
GLOBAL TELESYSTEMS, INC.**

December 13, 2000

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## **EXECUTIVE SUMMARY**

Global TeleSystems, Inc. (“GTS”) is a leading competitive provider of telecommunications services in Europe and the United States. GTS has experienced first-hand the threats to competition posed by the anti-competitive market behavior of Applicant Deutsche Telekom AG (“DTAG”). Based on its experience in Germany, GTS is concerned over the special dangers to competition in the U.S. market and to the interests of U.S. consumers that will occur if DTAG acquires VoiceStream Wireless Corporation (“VoiceStream”). Specifically, GTS is concerned that the safeguards currently in place are not sufficient for the effective regulation and monitoring of a large foreign carrier, such as DTAG, that is majority-owned and controlled by a foreign government.

Nevertheless, GTS does not believe that DTAG’s Application should be denied. Rather, GTS believes that additional safeguards on DTAG are required in order to adequately protect U.S. consumers and to preserve and promote competition in the U.S. market. The Commission has complete discretion to enforce any conditions necessary on merging parties in order to protect competition in the U.S. market. GTS urges the Commission to utilize this discretion to either craft conditions, or enforce conditions reached through voluntary commitments by the parties, that get to the root of the special concerns raised by this transaction and which will serve the public interest.

When a foreign carrier seeks to acquire an interest in a U.S. carrier, the Commission is required to review the acquisition to determine whether it is in the public interest. This public interest inquiry involves several factors, including competition, national security, law enforcement, foreign policy or trade concerns. In 1997, the Commission adopted a “rebuttable presumption” that applications from carriers from WTO Members do not pose concerns that

would justify denial of the application on competition grounds. However, GTS is not urging that the instant Application be denied, but that it be approved with certain conditions.

Further, this transaction involves rare and unique circumstances that raise additional public interest concerns. These circumstances include: (i) the level of government ownership and control of DTAG; (ii) the failure of the German government to carry out its WTO commitments concerning fair competition; and (iii) DTAG's history of anti-competitive market behavior. If not adequately addressed, DTAG would be able to leverage the advantages these circumstances give it to the detriment of competition in the U.S. market.

These unique circumstances, involving several issues of first impression, warrant a closer examination by the Commission into the German telecommunications market in order to determine what additional safeguards might be necessary to prevent DTAG from importing its anti-competitive practices into the U.S. market. DTAG's anti-competitive practices – and the German government's manipulation of the regulatory environment in DTAG's favor – have already caught the attention of the Executive Branch of the U.S. Government, prompting the United States Trade Representative to initiate an investigation into the German telecommunications market which is still ongoing. Further, unconditional approval of DTAG's Application would allow DTAG to continue to engage in such conduct in the German market (Europe's largest), with inevitable adverse effects on the U.S. market as U.S. carriers find themselves unable to compete.

Therefore, in order to safeguard the public interest and to ensure that competition in the U.S. market is not adversely affected, GTS believes that the Commission should approve the above-captioned Application only if DTAG agrees to the following conditions, at a minimum:

- To offer competitive carriers leased line access at terms and conditions that enable them to offer competitive broadband services in Germany;
- To adhere to binding provisioning intervals;
- To accept effective contractual penalties for late delivery or non-delivery;
- To accept shorter forecasting intervals by competitors and to reduce the contractual penalties for ordering shortfalls to reasonable levels; and
- To grant access to DTAG's internal provisioning standards in order to establish an effective system for automatic performance measurement.

These conditions go to the root of competition problems in Germany that not only impede entry by competitive U.S. carriers, but also provide DTAG with unfair advantages which DTAG can easily leverage to the detriment of competition in the U.S. market. These measures will place a check on anti-competitive behavior by DTAG and also address trade concerns raised by the Executive Branch through the United States Trade Representative.

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IB Docket No. 00-187

**COMMENTS OF  
GLOBAL TELESYSTEMS, INC.**

Global TeleSystems, Inc. ("GTS"), on behalf of its wholly-owned subsidiary, Global TeleSystems (Deutschland) GmbH, hereby submits to the Commission its comments on the above-captioned Application for Transfer of Control and Petition for Declaratory Ruling filed by Deutsche Telekom AG ("DTAG") and VoiceStream Wireless Corporation ("VoiceStream").

**I. Introduction**

GTS is one of the foremost new entrants in the European telecommunications market. GTS serves businesses and carriers throughout Europe with a range of broadband, Internet/IP and voice products. The company has Europe's largest cross-border fiber-optic network (stretching across 17,500 route kilometers), as well as "GTS Ebone," Europe's largest Tier-1 IP backbone. The GTS network is the most extensive trans-European broadband network, with points of presence in over 50 European cities and Internet backbone connectivity to the United States via New York.

As a competitive provider of telecommunications services in the United States and Europe, GTS has, as discussed more fully below, experienced first-hand the threats to competition posed by DTAG's market behavior and government ownership and control. Therefore, GTS is concerned over the special dangers to competition and the interests of U.S. consumers posed by DTAG's proposed acquisition of VoiceStream. DTAG's anti-competitive actions in the German market and elsewhere have already forced GTS to unnecessarily expend substantial additional resources to maintain a foothold on an uneven playing surface. These are resources that could have otherwise been allocated toward the further development and refinement of GTS's competitive services in markets such as the United States.

DTAG's acquisition of VoiceStream raises particularly significant concerns because of the developing state of the mobile wireless market throughout the world and the nature of DTAG's proposed U.S. acquisition. The increasing use of multi-national roaming agreements and the increasing capabilities of mobile technologies are leading to the rapid globalization of the mobile market, which could not be foreseen when the Commission's Foreign Participation Order was issued in 1997.<sup>1</sup> An example of this globalization is the recent announcement by U.S. carriers AT&T Wireless and Cingular Wireless (a joint venture between BellSouth and SBC Communications) that they will both be adding GSM capabilities to their U.S. networks, thus allowing the estimated 400 million GSM users worldwide to be able to use their services in the U.S. once roaming agreements are set up.<sup>2</sup>

DTAG itself apparently recognizes the expanding international aspect of the mobile market when it discusses in its application "the combination of VoiceStream's network with

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<sup>1</sup> / Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration, FCC 97-398, 12 FCC Rcd 23891 (1997) (hereinafter *Foreign Participation Order*), ¶ 112.

DT[AG]'s extensive systems in Europe,"<sup>3</sup> and states further that "the merger will present opportunities for seamless, single-handset services throughout the world that will make VoiceStream's use of the GSM standard a key asset in the United States."<sup>4</sup> If U.S. wireless carriers are expected to compete with DTAG's proposed "seamless" wireless service, they will in turn need to be able to terminate traffic with end-users in other countries where DTAG/VoiceStream is also providing services, such as Germany. However, in order to reach those end-users, particularly fixed-line end-users in Germany (where DTAG controls 98.9 percent of the local fixed-line market)<sup>5</sup>, U.S. carriers will confront DTAG's anti-competitive behavior full on.

While GTS recognizes there are benefits of competition by allowing new entrants into the U.S. market, these new entrants should be required to compete fairly, under fair terms and conditions. GTS is concerned that the safeguards currently in place are not sufficient for the effective regulation and monitoring of a large foreign carrier, such as DTAG, that is majority-owned and controlled by a foreign government, and that additional safeguards are necessary. Nevertheless, GTS does not believe that DTAG's application should be denied, so long as these additional safeguards are imposed.

In determining what safeguards would be appropriate, the Commission should examine DTAG's conduct in its home market and consider the extent to which DTAG can leverage its dominance and government influence in Germany. Having made such an examination, GTS strongly urges the Commission, in approving the instant application, to apply appropriate

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<sup>2</sup> / See Ray LeMaistre, *AT&T and Cingular Commit to GSM*, Total Telecom, Nov. 30, 2000, at <http://www.totaltele.com> (attached hereto as Exhibit A-1).

<sup>3</sup> / In the Matter of VoiceStream Wireless Corporation, Transferor, and Deutsche Telekom AG, Transferee, Application for Transfer of Control and petition for Declaratory Ruling, IB Docket 00-187 (Sept. 18, 2000) ("*DTAG Application and Petition*") at 2.

<sup>4</sup> / *Id.* at 27.

<sup>5</sup> / See Exhibit E, attached hereto.



conditions or at least obtain voluntary commitments from DTAG as outlined in Part II below. These measures will prevent the type of conduct in which DTAG has regularly engaged -- particularly in Germany -- from having an adverse effect on the U.S. market.

## **II. Proposed Conditions to be Attached to the Merger**

The Commission has complete discretion to enforce any conditions necessary on the merging parties in order to protect competition in the U.S. market.<sup>6</sup> In this case, because many of the anti-competitive activities DTAG engages in occur in Germany, but have effects here, the Commission will need to craft conditions, or enforce conditions reached through voluntary commitments by the parties, that get to the root of the problem in Germany if the Commission hopes to protect competition here in the United States. In particular, the Commission should find that the planned ownership transfer is only in the public interest if, at a minimum, DTAG agrees to the following conditions governing its actions in Germany:

- (1) To offer competitive carriers leased line access (especially end-user links) at terms and conditions that enable them to offer competitive broadband services in Germany;
- (2) To adhere to binding provisioning intervals;
- (3) To accept effective contractual penalties for late delivery or non-delivery;
- (4) To accept shorter forecasting intervals by competitors and to reduce the contractual penalties for ordering shortfalls to a reasonable level; and
- (5) To grant access to DTAG's internal provisioning standards in order to establish an effective system for automatic performance measurement.

As described in more detail below, these conditions will help ensure that DTAG will be unable to import its anti-competitive practices and their effects to the U.S. market. They will

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<sup>6</sup> / *Foreign Participation Order*, ¶ 51.

also help to minimize the possible threat to the public interest posed by the entry of a dominant foreign carrier owned and controlled by a foreign government into the U.S. market.

### **III. The Legal Standard for Approval for Foreign Applicants**

#### **A. U.S. Law Places Strict Limits on Foreign Ownership of Licenses to Safeguard the Public Interest**

One of the guiding principles of telecommunications regulation in the United States has been and continues to be the safeguarding of the public interest. It was for this very purpose that foreign ownership limitations were incorporated into Section 214 and Section 310 of the Communications Act of 1934, as amended,<sup>7</sup> (the “Act”) and were retained by Congress when it reformed the Act in 1996. In its decision to retain Section 214 and Section 310, Congress clearly intended foreign ownership to be a factor in the granting of licenses, including an assessment of the state of competition in foreign markets. A narrow interpretation of the public interest mandate of Section 310 that would preclude any inquiry into the environment in which a foreign carrier such as DTAG operates would both frustrate Congress’s intent and eviscerate the public interest safeguards written into the law.

As the Commission itself has recognized, the public interest inquiry to be undertaken within the context of reviewing applications for foreign participation in the U.S. telecommunications market involves several factors<sup>8</sup> and would necessarily incorporate a review of concerns raised by the manner in which an applicant such as DTAG conducts itself in its home market, including the market and regulatory environment in which it operates. In addition to competition concerns, other public interest concerns identified by the Commission include the presence of cost-based accounting rates and any national security, law enforcement, foreign

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<sup>7</sup> / 47 U.S.C. §§ 201 *et seq.* (2000).

<sup>8</sup> / *See, e.g., Foreign Participation Order*, ¶¶ 50, 61, 65, 113.

policy or trade concerns raised by the Executive Branch of the U.S. Government.<sup>9</sup> As the Commission stated in the Foreign Participation Order, it is “statutorily obligated to evaluate all applications to ensure that they are consistent with the public interest.”<sup>10</sup>

**B. The Standard of Scrutiny under the Foreign Participation Order**

In its 1997 *Foreign Participation Order*, the Commission set forth the standard of scrutiny to be applied pursuant to Section 214 and Section 310 in reviewing applications by foreign entities for telecommunications licenses in the United States. Specifically, the order creates a presumption that entrants from WTO countries such as Germany are upholding commitments made under the WTO’s Basic Agreement on Telecommunications regarding the opening of their telecommunications markets.<sup>11</sup> The order assumes that allowing foreign carriers from these countries to own U.S. common carriers is in the public interest, except in “very rare circumstances.”<sup>12</sup> To this end, the Commission has established a “rebuttable presumption” that applications from carriers from WTO Members “do not pose concerns that would justify *denial* of an application on competition grounds.” (Emphasis added).<sup>13</sup> GTS reiterates that it is not urging the Commission to deny the instant application, but rather to approve it with certain conditions designed to safeguard the public interest. The “rebuttable presumption” therefore does not apply, since *denial* of the application on competition grounds is not at issue.

Further, DTAG claims that this “rebuttable presumption” demands that the Commission approve its application without further inquiry.<sup>14</sup> However, as demonstrated below, this proposed acquisition by DTAG of a U.S. common carrier is precisely the type of “rare circumstance” that calls for further inquiry into the public interest concerns raised.

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<sup>9</sup> / *See, e.g., Id.*, ¶¶ 59, 61.

<sup>10</sup> / *Id.*, ¶ 46.

<sup>11</sup> / *Id.*, ¶ 50.

<sup>12</sup> / *Id.*

### **C. The Need to Consider Additional Public Interest Concerns**

The Foreign Participation Order's presumption in favor of foreign carriers from WTO countries was not intended to be a blanket presumption, as DTAG claims it to be. Rather, as the Commission stated, the presumption is "*a* factor in our public interest analysis" (emphasis added)<sup>15</sup> and the Commission expects that "other public interest issues . . . will be raised only in very rare circumstances."<sup>16</sup> DTAG's proposed acquisition of VoiceStream is just such a case.

The circumstances which make this proposed transaction unusual include: (i) the level of government ownership and control of DTAG; (ii) the failure of the German government to carry out its WTO commitments; and (iii) DTAG's history of anti-competitive market behavior. These unique circumstances, several of which raise issues of first impression for the Commission, warrant a closer look by the Commission into the German telecommunications market and into the rapidly-developing global wireless market to determine what additional safeguards might be necessary in approving this application in order to promote competition and protect the public interest.

## **IV. Unique Circumstances Concerning this Transaction**

### **A. Government Ownership and Control**

The level of ownership and control of DTAG by the German government is one example of rare circumstances which implicate additional public interest considerations. Currently, 58.2 percent of DTAG is owned directly or indirectly by the German government. In its application, DTAG asserts that this level will eventually decrease to approximately 44 percent upon

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<sup>13</sup> / *Id.*

<sup>14</sup> / *See DTAG Application and Petition*, 33-36.

<sup>15</sup> / *Foreign Participation Order*, ¶ 50.

<sup>16</sup> / *Id.*

completion of its mergers with VoiceStream and Powertel.<sup>17</sup> Even if this is so, the German government will continue to be the single largest shareholder in DTAG by a substantial margin and will therefore, as a practical matter, experience no real loss of power or influence as a shareholder. This eventual 44 percent ownership stake also is still far in excess of the Commission's long-established threshold of 25 percent for a presumption of significant influence over a carrier.<sup>18</sup> DTAG claims in its application that the German government has been divesting itself of its stake in DTAG "as rapidly as possible,"<sup>19</sup> yet it has taken over five years for Germany to bring its stake down to just under 60 percent<sup>20</sup> and neither DTAG nor the German government have been able to provide any reliable indicators as to when (or if) this stake will be reduced further. As recently as October 24, 2000, the Wall Street Journal quoted a German government official as saying that, with DTAG's share price slumping, "there's no way we're going to sell."<sup>21</sup>

Further evidence of how deeply the German government is intertwined with DTAG -- and how it is anything *but* an "ordinary" shareholder -- is demonstrated by Germany's Federal Agency for Telecommunications and Post (the "Agency"). Under German law, the Agency holds and administers all rights and duties of the government in relation to its shareholdings in DTAG, including its rights as a shareholder under the German Stock Corporation Law.<sup>22</sup> The Agency is controlled by the Federal Ministry of Finance, meaning that any sale of DTAG stock requires prior approval from the Ministry of Finance. In addition to this role, the Agency, with 2,200 employees and offices throughout Germany, performs various other tasks such as

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<sup>17</sup> / *DTAG Application and Petition* at 10 and at 36.

<sup>18</sup> / *See, e.g.*, 47 C.F.R. §§ 63.09, 63.11, 63.18.

<sup>19</sup> / *DTAG Application and Petition* at 9.

<sup>20</sup> / For comparison, Britain's former state-owned monopoly British Telecommunications plc has long been privatized, and Ireland was able to successfully decrease its stake in its state-owned monopoly, eircom plc (f/k/a Telecom Eireann), from 80 percent to under 10 percent in 1999 alone.

<sup>21</sup> / William Boston, *Deutsche Telekom CEO Finds Time is Against Him*, Wall Street Journal, Oct. 24, 2000, at C1.

administering vacation homes for DTAG and Post employees and providing DTAG and Post employees with special health and accident insurance and pension plans.

In addition to its substantial ownership interest, the German government also wields significant influence and control over DTAG, despite DTAG's claims to the contrary. In its application, DTAG states that the German government and the government-controlled bank "have each only appointed one member of [DTAG]'s Supervisory Board, even though their ownership interests entitle them to appoint up to 10 members."<sup>23</sup> In fact, as illustrated in Exhibit B attached hereto, of the 20 members of DTAG's Supervisory Board, more than half are either government officials, representatives of government-controlled institutions, or representatives of trade unions with very close ties with Germany's current ruling party. DTAG also asserts rather disingenuously in its application that the German government has not appointed any members of DTAG's Management Board, which oversees DTAG's day-to-day business.<sup>24</sup> The Management Board, however, is nevertheless appointed by and supervised by the government-dominated Supervisory Board,<sup>25</sup> rendering claims of no government influence illusory at best.

As a result of this high level of government involvement, DTAG also benefits from preferential regulatory treatment and lax regulatory oversight, thus giving DTAG wide latitude to engage in various forms of anti-competitive behavior designed to impede competition and preserve DTAG's dominant position in the German market. While it is true, as DTAG asserts, that the German government is prohibited from providing direct subsidies to DTAG, it nevertheless has not flinched from using its influence to create a favorable regulatory environment for DTAG.

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<sup>22</sup> / Neuordnungsgesetz für Post und Telekommunikation (PostNeuOG), 1994 (BGBl. I S.2326).

<sup>23</sup> / *DTAG Application and Petition* at 10.

<sup>24</sup> / *Id.*

<sup>25</sup> / *Id.*

For example, Germany's Federal Ministry of Economics and Technology (the "Ministry"), which directly supervises the German regulator, RegTP, has released a Position Paper stating that RegTP must refrain "without undue delay" from reviewing DTAG's prices for domestic and international routes before they come into effect.<sup>26</sup> The Ministry also stated that RegTP should abolish completely the prior approval procedure for DTAG's business end-user prices by 2002/2003 because new access technologies "bear the potential" for intensifying competition on the local level,<sup>27</sup> although there is no evidence that this will actually occur. In addition, the Ministry has determined in its Position Paper that RegTP should approve DTAG's prices "for at least one year" in order "to avoid unnecessary bureaucracy putting a burden on the market, *in particular on DTAG.*"<sup>28</sup> (Emphasis added).

Further, a new Position Paper of the SPD Parliamentary Group has been drafted by Klaus Barthel, Chairman of the German Parliament's Sub-Committee on Telecommunications and Post with the purpose of amending Germany's existing telecommunications legislation specifically to benefit DTAG. Excerpts of this Position Paper were published on December 11, 2000, by the German newspaper *Die Welt*.<sup>29</sup> Based on this Paper, the ruling SPD Party is expected to introduce a formal bill to amend the German Telecommunications Act next year to provide DTAG even greater protection from competition than it already enjoys. Regardless of the Position Paper's formal legislative future, it will very likely be imposed on RegTP as a binding policy guideline, thus undermining both competition and RegTP's position as an independent

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<sup>26</sup> / Position Paper of the Federal Government of the Federal Republic of Germany on "*Competition in the Telecommunications and Post Markets*" (in German), August 16, 2000, 4-6 (available for download at <http://www.bmwi.de>) (Translation attached hereto as Exhibit C).

<sup>27</sup> / *Id.*

<sup>28</sup> / *Id.*

<sup>29</sup> / *Streit um Regierungskoalition – SPD will Telekom schützen*, *Die Welt*, Dec. 11, 2000 (available for download at <http://www.welt.de>).

regulatory authority. Additional examples of the German government's manipulation of the regulatory environment in favor of DTAG are also discussed in the sections below.

The level of government ownership and control described above have never before been encountered by the Commission in reviewing applications by foreign carriers pursuant to Section 310 of the Communications Act. Therefore, its potential competitive impact should be more closely reviewed. This is especially true given that, while the Commission's current competition safeguards work well when applied to non-government-owned foreign carriers, they do not provide adequate protection against potential anti-competitive behavior by government owned and controlled carriers.

#### **B. The German Government is not Meeting its WTO Commitments**

While it is not the place or the purpose of this proceeding to determine whether Germany is in violation of its WTO commitments, the fact that the Executive Branch of the U.S. Government, through the United States Trade Representative ("USTR"), has been pursuing this very question demonstrates that there are additional public interest concerns implicated by this proposed merger which must be considered by the Commission, including trade concerns. GTS therefore urges the Commission to consult closely with the USTR in order to ensure that these trade concerns are adequately addressed.<sup>30</sup>

In signing on to the WTO Basic Telecommunications Agreement, Germany made certain commitments to open its telecommunications market to competition. As the USTR states in its 1999 Annual Report, the commitments contained in this agreement are "focused on unimpeded

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<sup>30</sup> / In connection with this discussion concerning Germany's failure to live up to its international trade commitments, GTS also calls the Commission's attention to Germany's repeated refusal to adopt a 25 percent market-share threshold for determining whether a telecommunications provider has Significant Market Power ("SMP") for regulatory purposes. This threshold is *mandatory* under European Union law and is binding on Germany, yet Germany still refuses to comply. GTS urges the Commission to regard this as a warning flag concerning the German government's international trade commitments.



market access, fair rules, and effective enforcement of key regulatory principles.”<sup>31</sup> It is on the basis of these commitments that the Commission adopted the presumption in the Foreign Participation Order which is at issue. However, while Germany has created a set of laws and regulations which conform to WTO standards by opening up its market to competition, the manner in which these laws and regulations are being implemented have in fact created *de facto* barriers to competition and market entry as described below – barriers that are continuing to grow ever higher. These barriers include exorbitant license fees, interconnection problems, leased line and local loop access costs and provisioning, a lack of regulatory transparency, and a lack of regulatory enforcement.

These concerns have led the USTR to open an on-going investigation of Germany under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (“Section 1377”).<sup>32</sup> The USTR has also identified many of these issues as barriers to entry by U.S. companies in Germany in its 2000 National Trade Estimate Report on Foreign Trade Barriers (“2000 NTE Report”).<sup>33</sup> In the 2000 NTE, the USTR states:

“In Germany, the cost of obtaining a license is several times higher than in any other European country and is cited by U.S. businesses as a barrier to entry. The issue is being litigated in the German courts but a recent ruling overturned a preliminary injunction against the charges. The case could take years to resolve definitively or might simply be dropped if the plaintiff decides the costs outweigh the chances of a favorable outcome. Both scenarios prolong the incumbent’s advantage.”

- 2000 NTE Report at 118.

The USTR also has noted that interconnection is another significant barrier to entry in the German market by competitive U.S. companies. Several new entrants reported to the USTR that

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<sup>31</sup> / Office of the United States Trade Representative, *1999 Annual Report*, at 111 (available for download at <http://www.ustr.gov>).

<sup>32</sup> / 19 U.S.C. § 3106 (2000).

<sup>33</sup> / Office of the United States Trade Representative, *2000 National Trade Estimate Report on Foreign Trade Barriers* (hereinafter “2000 NTE Report”) (available for download at <http://www.ustr.gov>).

DTAG “was not providing interconnection in a timely fashion, on terms, conditions and cost-oriented rates that are transparent and reasonable,”<sup>34</sup> especially with regard to interconnection ports and collocation. Serious backlogs have resulted for competitors to obtain points of interconnection from DTAG. These problems have been exacerbated by a lack of binding intervals on DTAG for the provisioning of leased lines, collocation space, and local loop access. For example, DTAG has in many cases forced GTS to wait six months or more for local access to the end-user via leased lines (this situation is discussed more fully in Part V, *infra*). It was not until June of 2000 that RegTP finally imposed binding provisioning intervals for unbundled local loop access, however DTAG as yet faces no contractual or regulatory penalties if these intervals are not met. And for leased lines and interconnection, there are no deadlines or intervals at all. In January 1999, RegTP released a plan for prioritizing interconnection orders, but no competitor has yet benefited from it. As Ambassador Charlene Barshefsky stated in announcing the continuation of the USTR’s Section 1377 investigation of Germany, “Without timely interconnection, competition cannot take root. We urge the German government to re-double its efforts to ensure that Deutsche Telekom quickly reduces its remaining interconnection backlog.”<sup>35</sup>

These issues sufficiently call into question Germany’s fulfillment of its WTO commitments and implicate trade concerns not covered by the “rebuttable presumption” of the Foreign Participation Order. GTS thus urges the Commission to consult closely with the USTR in order to ensure that these concerns are adequately addressed before approving DTAG’s application.

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<sup>34</sup> / *Id.* at 118.

<sup>35</sup> / USTR Press Release 00-46, June 16, 2000 (available for download at <http://www.ustr.gov>).

### C. DTAG Has a History of Anti-competitive Behavior

Contrary to the assertions contained in its application to the Commission, there is very little regulatory control or oversight to prevent cross-subsidization by DTAG. To the extent that accounting separation is required, the current regulatory scheme in Germany only differentiates between residential and non-residential services and places international, national long distance, local, and access services into the same basket.<sup>36</sup> This leaves DTAG perfectly situated to comply with the overall price caps by offering competitive rates for its international and long-distance services while maintaining the prices for local access services artificially high. In its Application and Petition, DTAG claims that “inflating [DTAG]’s local rates in Germany would cause [DTAG] to lose market share,”<sup>37</sup> yet after over two years of “open competition,” DTAG’s share of the local fixed-line market still stands at an overwhelming 98.9 percent (DTAG’s market share in 2000 is 364 million minutes per day, compared to 4 million minutes per day for all competitors combined).<sup>38</sup>

There is also no requirement for DTAG to file financial information with the regulatory authorities, except in the context of a tariff proceeding,<sup>39</sup> and the information that is filed is held confidential or heavily redacted and is thus effectively unreviewable by its competitors, U.S. or European Union regulators, or even by other agencies within the German government or by the German courts. Seen in this light, DTAG’s claim that “accounting safeguards imposed by the

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<sup>36</sup> / *Foreign Government Ownership of American Telecommunications Companies: Oversight Hearing Before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Commerce Committee, 106<sup>th</sup> Cong. (2000)* (testimony of Andrew D. Lipman, Swidler Berlin Shereff Friedman, LLP, on behalf of Verband der Anbieter von Telekommunikations- und Mehrwertdiensten e.V. (“VATM” a.k.a. The German Competitive Carrier Association)) (hereinafter “*VATM Testimony*”) (attached hereto as Exhibit D) at 27.

<sup>37</sup> / *DTAG Application and Petition* at 41.

<sup>38</sup> / *See VATM Market Study* (attached hereto as Exhibit E). In 1999, DTAG’s share of the local fixed-line market was 99.4 percent (347 million minutes per day), while all competitors combined accounted for 0.6 percent (2 million minutes per day).

<sup>39</sup> / *See Telekommunikationsgesetz, v.25.7.1996 (BGB1. I S.1120)* (Telecommunications Act).

German regulatory authority would enable German, E.U. and U.S. regulators to detect and respond to any anti-competitive behavior”<sup>40</sup> simply does not hold up.

DTAG’s subsequent assertion that “the extent of competitive entry [into the German market] indicates that entrants do not fear cross-subsidization in Germany”<sup>41</sup> is, quite simply, false on its face. Competitive providers such as GTS make their decisions on whether to enter a market based on a myriad of factors, and “fear of cross-subsidization” has never been the key factor. Nevertheless, cross-subsidization is still a threat to competitive providers and is capable of effectively preventing their entry or driving them from the market altogether. In fact, in testimony presented to the U.S. Congress by the German competitive carrier association VATM,<sup>42</sup> cross-subsidization is the first item on a list of anti-competitive behavior engaged in by DTAG in Germany.<sup>43</sup> DTAG also claims in its application that it “does not have any incentive to charge inflated rates for its local facilities in order to cross-subsidize predatory wireless rates in the United States.”<sup>44</sup> This claim is presented without any support and, given the complete lack of transparency of DTAG’s accounts and costs and its near absolute control of the local German market, simply cannot be relied upon.

Regulatory transparency and enforcement continue to be serious problems in Germany and their insufficiency has allowed DTAG to continue to engage in further anti-competitive conduct. Tariff applications and full regulatory decisions are not made available to the public, but only to those who were parties to the proceedings. Even then, much of the data is heavily redacted in order to protect DTAG’s “business secrets.” This prevents competitors and other

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<sup>40</sup> / DTAG Application and Petition at 40-41.

<sup>41</sup> / DTAG Application and Petition at 41.

<sup>42</sup> / Verband der Anbieter von Telekommunikations- und Mehrwertdiensten (“VATM”) represents more than 50 telecommunications and multimedia companies which have entered the German market in competition with DTAG. Many of VATM’s members are financed, operated or controlled by U.S. interests. See Exhibit D, VATM Testimony, Appendix 1, for a List of Members.

<sup>43</sup> / VATM Testimony, 26-27 (Exhibit D).

from being able to determine whether DTAG's charges for access, interconnection, and other services are truly cost-based.

Regulatory procedures in Germany themselves are also long, expensive and burdensome, and RegTP, due to political pressure (as discussed in Part IV.A., *infra*), has thus far been unable to force DTAG to adhere to the rules, such as those on provisioning.

The lack of adequate transparency and separation of DTAG's accounts has also enabled DTAG to engage in predatory pricing and "price squeezes" on its competitors. For example, DTAG offers rebates to business customers based on traffic volume (so-called "TDN Agreements"). These rebate agreements are not made public, which not only frustrates the ability of competitors to match them, but also effectively prevents any complaints about these rebates from being raised. DTAG even engages in overt price squeezing by pricing its unbundled local loops at DM 25.40 per line, while the retail price for an analog line is DM 24.81. DTAG has also continued to maintain unreasonable delays and unreasonable conditions in the provisioning of leased lines, collocation space and network access for competitors. Further examples of anti-competitive behavior by DTAG are discussed in more detail in Section V below.

DTAG's history of on-going anti-competitive behavior demonstrates that current safeguards have thus far been ineffective in restraining such conduct. As the market for global wireless communications continues to develop, DTAG's conduct will inevitably have an adverse effect on competition in the U.S. market. Further, DTAG's anti-competitive conduct has substantially raised the cost of doing business in Germany for competitive companies such as GTS, thus forcing many U.S. carriers to expend extra resources in Germany rather than being able to further invest in its U.S. services and facilities.

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<sup>44</sup> / DTAG Application and Petition at 36.

GTS therefore urges the Commission to apply appropriate conditions or safeguards to its approval of the proposed transaction, such as accounting and provisioning transparency, mandatory provisioning intervals, and the acceptance of significant contractual penalties for failing to meet publicly-stated performance criteria. Such measures will prevent the type of anti-competitive conduct described below from adversely affecting competition in the U.S. market and protect the interests of U.S. consumers of telecommunications services.

## **V. Market Situation in Germany**

As discussed in Part IV above, the following concrete examples of DTAG's current obstructionist strategy in Germany support GTS's contention that additional safeguards are necessary in approving DTAG's application.

### **A. Leased Line Access and Provisioning for Local Access**

For large carriers, such as GTS, timely and reliable access to leased lines for local access in accordance with international "best practice" standards (such as in the U.S.), in addition to access the unbundled local loop, is crucial for getting a foothold into the emerging broadband market. GTS uses these leased lines as integral parts of its own products to connect end users' premises with its Internet backbone or otherwise to provide broadband access services of up to 2 Mbits and higher to end users. GTS has practically no alternative source from which to obtain these lines other than from the dominant carrier, DTAG. DTAG's strategy is to keep competitors out of this lucrative market by making it very difficult, if not impossible, to obtain these leased lines. DTAG refuses to commit itself to binding provisioning intervals for these lines, and sanctions for late-delivery of these lines are non-existent. An online ordering and order confirmation system, provisioning matrixes or other performance measuring standards, as they currently exist in many U.S. states, are unknown. Rather, DTAG refrains from making

available any information on the performance standards it uses for its own leased-lines provisioning by classifying such information as business secrets. This makes it very burdensome to simply place an order.

If an order is filed successfully, GTS and other competitive providers then face new obstacles. For instance, GTS placed two orders for leased lines in Frankfurt with DTAG in April 2000. Both orders are currently still pending -- more than 200 days after the orders were filed! In other cases, after GTS has filed an order, DTAG has notified GTS that GTS must first pay tens of thousands of dollars (US) up-front for alleged installation costs -- without providing any breakdown of the underlying costs -- before DTAG will even determine an installation date. Given the lack of available cost data, GTS is unable to verify the accuracy of DTAG's cost determination. Even if it pays the amount demanded by DTAG, the delivery date remains uncertain. This results in a complete loss of the funds paid to DTAG when the customer, unwilling to wait any longer for an unknown delivery date, finally cancels the order. As a result, GTS loses not only the funds, but the customer as well. It should be noted that when DTAG's aggressive win-back campaign succeeds in regaining a customer from a competitor, DTAG is able to accomplish the switchover in a matter of days, rather than months.

In sum, GTS believes that DTAG is clearly abusing its market power in this sector as a strategic tool to undermine competitors' business. GTS will only be able to serve its customer if it can rely on DTAG's delivery dates for leased lines and local loops. Instead, GTS has encountered delays in confirming the receipt of orders, delays in provisioning (without compensation to GTS), and the complete failure by DTAG to provide essential information on delivery dates and pricing.

The conditions proposed by GTS would serve to address these problems in a way that protects and promotes fair competition and prevents the behavior described above from having an adverse impact on competition in the U.S. market. Carriers must be able to gain access to leased lines from DTAG on fair, competitive and reasonable terms and conditions in order to offer competitive broadband services and bring the benefits of competition to the market and to consumers. As demonstrated above, DTAG's current offers are nearly the polar opposite of "fair and reasonable." Further, if DTAG were to accept binding provisioning intervals and effective contractual penalties for late delivery or non-delivery of leased lines, other carriers would then have the certainty required to effectively plan and roll out their service offerings to consumers. Access to DTAG's internal provisioning standards, along with an effective system of automatic performance measurement, likewise ensures that competitive carriers will be able to provide customers with the necessary assurance that their service will be delivered. Without these certainties, competition will come to a halt and soon vanish entirely.

#### **B. Flat Rate Services**

As the VATM described in more detail in its testimony,<sup>45</sup> earlier this year DTAG introduced a flat rate for bundled services (Internet access and voice telephony) in Germany for the first time. At the same time, DTAG has consistently refused to offer a wholesale flat-rate product to its competitors to enable them to offer their own flat rate service to consumers. DTAG has therefore created a significant price squeeze between the German interconnection fees, which are calculated on a per-minute-basis, and its retail prices based on its flat rate. This squeeze has already driven some Internet Service Providers ("ISP") out of business. DTAG's bundled flat rate product has a further harmful, anti-competitive effect since it will effectively allow DTAG to cross subsidize its own ISP, T-Online, through its highly profitable voice



services. It is evident that DTAG is losing money on the flat rate. T-Online announced a net loss for the first nine months of 2000, citing the flat-rate billing plan “that ate into German profits.”<sup>46</sup> According to T-Online’s quarterly report published on November 8, 2000, T-Online experienced losses of 14.4 million euros for the first nine months of the year.<sup>47</sup> However, unadjusted for the sale of the company’s share in online brokerage Comdirect, T-Online’s loss for this period was 53.5 million euros.<sup>48</sup> T-Online stated that it shifted to a flat rate fee to retain and attract customers and saw an increase in subscribers of 83 percent over the same nine-month period, with more customers shifting away from paying on a per-minute basis.<sup>49</sup> Considering that DTAG holds 81.7 percent of T-Online, the company will have no problem absorbing these losses. These results demonstrate a classic combination of price squeezing and predatory pricing designed to lessen competition in the German market.

RegTP has not fully resolved this problem with its recent decision on flat rates, released November 16, 2000,<sup>50</sup> since it declined to determine specific rates for flat-rate Internet access, nor did it set forth a cost model to be used in determining what these rates should be. Instead, RegTP intends to leave this to DTAG, arguing that only DTAG has the information necessary to develop an appropriate cost model. Further, RegTP has not set forth any transparency or other requirements that will enable it to monitor whether DTAG’s rates, when announced, are cost-based and non-discriminatory.

Although the flat-rate decision seems to be a promising step in the direction of fair competition, both DTAG and the German government took immediate action to nullify it. Klaus

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<sup>45</sup> / *VATM Testimony*, 27-29 (Exhibit D).

<sup>46</sup> / *T-Online Posts Nine-Month Loss*, New York Times on the Web: Breaking News from A.P., Nov. 8, 2000 (attached hereto as Exhibit A-2).

<sup>47</sup> / *Id.*

<sup>48</sup> / *Id.*

<sup>49</sup> / *Id.*

<sup>50</sup> / Decision of Ruling Chamber 3 BK 3b 00/33 et al. of Nov. 16, 2000.

Barthel, the author of the new Position Paper urging the amendment of the German Telecommunications Act, denounced the decision as “bowing down to massive pressure of certain interest groups.”<sup>51</sup> DTAG publicly announced that it “would take ‘massive action’ to oppose the ruling,” including “checking the legality” of the ruling and threatening to withdraw T-Online’s retail flat-rate Internet access service from the market altogether<sup>52</sup> – a move that could hardly be construed as being in the interests of consumers.

On December 7, 2000, DTAG announced that it would comply with the flat-rate ruling and would soon have an offer ready. However, the ruling only applies to DTAG’s analog and ISDN lines and does not address wholesale flat rates for DSL services – the technology on which DTAG’s efforts are now focused. The ruling also will not affect DTAG’s current predatory pricing of its unfairly bundled DSL and ISDN services, which allows customers who combine DTAG’s DSL and ISDN services to essentially receive ISDN service for free. To illustrate, DTAG’s price for its own DSL service over an analog line is DM 64.71 per month (DM 24.81 for the analog line and DM 39.90 for the DSL service), while its price for its own DSL service over an ISDN line is DM 64.79 per month (DM 44.89 for the ISDN line, but only DM 19.90 for the DSL service). Further, if a customer combining DTAG’s ISDN and DSL services pays an extra DM 5 per month, that customer will be eligible for DTAG’s “AktivPlus Plan” and receive rebates of approximately 50 percent on all calls and free calls on Sundays. Competitors simply cannot match this offer without incurring enormous losses, and the flat-rate decision as it now stands will do nothing to address this.

Soon after the flat-rate decision was issued, the President of RegTP, Klaus-Dieter Scheurle, announced that he will be leaving his post by the end of the year. Mr. Scheurle’s pro-

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<sup>51</sup> / *Streit um Regierungskoalition – SPD will Telekom schützen*, Die Welt, Dec. 11, 2000 (available for download at <http://www.welt.de>).

competition stance had placed him under enormous pressure from both DTAG and the German government. His resignation demonstrates the difficulty for a nominally independent regulator to be able to withstand the pressure exerted on it by the German government. Matthias Kurth, currently the Vice President of RegTP and a long-time official of the ruling SPD Party, is expected to be appointed as RegTP's new President. Mr. Scheurle's departure under political pressure is yet another example of the special relationship between DTAG and the German government that, without adequate safeguards, could adversely affect competition in the U.S. market.

### **C. Local Loop Access and Provisioning**

Competitive carriers intending to order unbundled local loops from DTAG are facing a multitude of burdensome obligations and other obstacles. Whereas DTAG promotes its own DSL services as a milestone step forward into the Internet age, competitors requesting access to the local loop are forced to submit binding forecasts for ordering collocation space for a period of 26 weeks in advance. This forecast must contain the concrete number of orders per local network and an indication of the type of access requested. The number of orders per local network is strictly limited, and if the number of the competitor's actual orders within a 26-week period falls short of the forecasted number by a margin of 10 percent, the competitor must pay DTAG significant contractual penalties. On the other hand, DTAG faces no contractual penalty if it does not provide the loop within the contractually defined time periods. GTS fully supports the VATM's statement in its testimony that DTAG's loop provisioning delays are tremendous and have a significant negative impact on competition in Germany.<sup>53</sup>

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<sup>52</sup> / Bertrand Benoit, *T-Online May End Flat-rate Web Access*, Financial Times, Nov. 27, 2000, at 17.

<sup>53</sup> / See *VATM Testimony*, 17-21 (Exhibit D).

As with leased line access, these barriers to competition would be effectively addressed through the conditions proposed by GTS. Binding provisioning intervals, the acceptance of significant contractual penalties for late delivery or non-delivery of unbundled local loops, and access to DTAG's internal provisioning standards would all allow other carriers to accurately and effectively develop their business plans and service offerings. Consumers would benefit from both the increased competition and the certainty that they will receive the services that they order in a timely manner. In addition, the developmental speed of the telecommunications market, particularly in DSL services, makes it unreasonable to require competitive providers to provide accurate forecasts six months in advance and then penalize them severely for a shortfall margin of only 10 percent – a margin that is razor-thin given the time-frame involved and the inherent unpredictability of the marketplace. Shortening the forecast interval will enable other carriers to make more accurate estimates of their forecasted needs, not only promoting competition but also increasing the efficient allocation of DTAG's inherited infrastructure. And while penalties for inaccurate forecasts may be justifiable, they should not be so severe that carriers are encouraged to understate their future needs, only to find themselves unable to meet future demand.

#### **D. Unreasonable New Interconnection Requirements**

GTS also does not agree with DTAG's new network element-based system for interconnection rates which, pursuant to a decision issued by RegTP on September 9, 2000, imposes a requirement of up to 475 local points of interconnection ("POI") by early 2001 on any competitive carrier that seeks local interconnection tariffs for the entire territory of Germany.<sup>54</sup> This measure raises the bar (and ensuing costs) for many competitive providers. This is

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<sup>54</sup> / Decision of Ruling Chamber 4 of Sept. 9, 2000 (to be published in the Official Gazette); *See also VATM Testimony*, 22-23 (Exhibit D).

especially true for the many U.S. companies with nationwide activities in Germany that relied on the RegTP's ruling last year that they only needed a minimum of 23 POIs in order to cover Germany. These companies are now faced with the burden of making a huge new investment in POIs to mirror DTAG's inefficient network if they don't want to lose considerable ground. Under the new network-element based structure, these competitors would be severely punished for their streamlined national network structure on the basis of 23 POIs because DTAG would charge them the single tandem-tariff, rather than the local tariff, to terminate the calls. This extremely unfair situation was not at all foreseeable by the competitive service providers, and therefore makes their existing business cases obsolete.

## **VI. Proposed Measures**

GTS acknowledges that the Commission has complete discretion to impose merger conditions upon the Applicant. It also realizes that the German Federal Government is currently not prepared to completely divest itself of its stake in DTAG within a foreseeable time period. Therefore, GTS believes that the Commission must apply additional safeguards on DTAG and strongly urges the Commission to apply appropriate merger conditions to the proposed transaction, or at least obtain voluntary and verifiable commitments from DTAG.

GTS has described DTAG's ongoing anti-competitive conduct in detail in Part V above, as well as various conditions which, if adopted, would restrict such conduct and promote fair and effective competition. These conditions are:

- (1) To offer competitive carriers leased line access in a timely manner in accordance with international best practices and at terms and conditions that enable them to offer competitive broadband services in Germany;
- (2) To adhere to binding provisioning intervals based on an efficient organizational model;

- (3) To accept effective contractual penalties for late delivery or non-delivery;
- (4) To accept shorter forecasting intervals by competitors and to reduce the contractual penalties for ordering shortfalls to a reasonable level; and
- (5) To grant RegTP and competitive providers access to DTAG's internal provisioning standards in order to establish an effective system for automatic performance measurement.

These conditions will address serious competition issues in Germany that, if left unchecked, will have an adverse effect on competition in the U.S. market as well. Taken together, they ensure that competitive carriers will be able to provide consumers with high-quality, low-cost, reliable services. They also ensure that DTAG, a government-owned and controlled dominant foreign carrier, will be unable to leverage its advantages to the detriment of U.S. consumers.

## **VII. Conclusion**

While GTS supports the entry of DTAG into the U.S. market through its proposed acquisition of VoiceStream, GTS believes that the safeguards currently in place are not sufficient for the effective regulation and monitoring of a government-owned and controlled dominant foreign carrier such as DTAG. GTS therefore urges the Commission to grant its approval to the proposed transaction, but to condition its approval upon the acceptance by DTAG of the additional measures discussed above. These measures serve to safeguard the public interest by placing a check on anti-competitive behavior by DTAG that threatens to adversely affect competition in the U.S. market, and also by addressing trade concerns raised by the Executive Branch of the U.S. Government through the United States Trade Representative.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Troy F. Tanner", is written over a horizontal line.

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